



The ATOZ Chair for European and International Taxation welcomes you to:

The MLI and the OECD Update 2017: BEPS in Tax Treaties



INTRODUCING THE MLI (and the speakers)

Prof. Dr. Werner Haslehner
ATOZ Chair for European and International Taxation



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IN LAW



What is the MLI?

- Presented at OECD in Paris on **7 June 2017**
- Signed by **71 jurisdictions, including 27 EU MS** (25 October 2017)
- Principal idea: implement **BEPS-changes** at once in **over 1200 bilateral DTCs!**
- Practical effect: **complex changes**, far from uniform result
- Effective from 2018/2019 (?)

BEPS minimum standards and other content

Hybrids <i>BEPS Action 2</i>	Anti-Abuse <i>BEPS Action 6</i>	PEs <i>BEPS Action 7</i>	Dispute Resolution <i>BEPS Action 14</i>
3 Transparent entities	6 DTC Purpose (Preamble)	12 Commissionaire arrangements	16 MAP Commitment
	7 GAAR (or LOB)		
4 Dual residents	8 Dividend holding period	13 Specific Entity Exemptions	17 Corresponding Adjustments
	9 Gains from RE	14 Contract Splitting	19 Mandatory Binding Arbitration
5 Method Article	10 PEs in 3 rd countries	15 Closely related person	
	11 Saving clause		

MLI Implementation

Entry into force of MLI

- **Signature and ratification** by 5 contracting jurisdictions
- Effective on 1st day of year following ratification by both (for WHT)
- Effective six months after ratification by both (for other taxes)

Covered Tax Agreement

- **Matching designation** of DTCs by contracting states
- “Ratification” for each DTC?

Options and Reservations

- Options and reservations concern all covered tax agreements
- Unilateral decision, symmetric application (“**matching principle**”)
- Exceptions: Article 5, Article 23(5) MLI

Interaction with DTC

- Both MLI and DTC exist separately
- MLI supersedes as specified in “compatibility clauses”:
replacing, modifying, or complementing existing DTC provisions
- Later DTC changes supersede MLI

Speakers

- **Professor Yariv Brauner**
Hugh Culverhouse Eminent Scholar Chair in Taxation, Levin College of Law,
University of Florida
- **Professor Ekkehart Reimer**
Director of the Institute for Finance and Tax Law,
University of Heidelberg
- **Professor Georg Kofler**
Director of the Institute of Finance Law, Tax Law and Tax Policy,
Johannes Kepler University Linz



Beyond the MLI

BEPS-related Changes in the OECD Update 2017



INSTITUT FÜR
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STEUERRECHT



UNIVERSITÄT
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SEIT 1386

Professor Dr. Ekkehart Reimer
14 December 2017

Overview

1. MLI and MC: A Sound Dualism
2. Key Tax Features of the MLI
3. Key Features of the 2017 OECD Update
4. Conformity and Divergence
5. Outlook



71 signatories	35 Member Countries
restricted to existing DTCs	restricted to text of future DTCs
restricted to part of the inter-se DTCs (“covered agreements”)	covers both inter-se DTCs and DTCs with third States
eclectic	comprehensive
combat abuse	(1) combat double taxation (2) combat collateral abuse
restricted to technical “rules of the road”	focus on allocation of revenue
hard law	soft law
self-executing (as a rule)	only textual pattern, used in bilateral negotiations
one single multilateral text, but bilateral selection à la carte	directing many bilateral texts, tailor-made allocation of revenue, yet, less technical deviations

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2. Key Tax Features of the MLI

- avoid hybrid mismatch arrangements
- introduce limitation of benefits (SLOB) or principal-purpose test
- avoid the artificial avoidance of PEs
- avoid tax planning schemes with (third-country) PEs
- introduce corresponding adjustments
- avoid tax planning with transparent partnerships
- restrict treaty entitlement of dual resident companies
- introduce a saving clause

2. Key Tax Features of the MLI

- cope with dividend stripping
- introduce situs principle for capital gains derived from shares in a REIT (...)
- effectuation of MAP
- introduction of non-binding arbitration



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3. Key Features of the 2017 OECD Update

- change of Title and Preamble
- restrict treaty entitlement (transparent entities, residents)
- use MAP instead of POEM for dual-resident companies
- use residence instead of POEM for rules on international traffic
- exclude boats and inland waterways transport from rules on international traffic
- insert rules on recognised pension funds

3. Key Features of the 2017 OECD Update

- refine PE definition
- refine situs principle for capital gains derived from shares in a REIT (...)
- suspend method articles (23A, 23B) in cases of [another] recipient residing in the other Contracting State
- insert new article with far-reaching anti-abuse rules
 - LOB
 - CFC-like PEs
 - PPT

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4. Conformity and Divergence

G20/OECD Multilateral Instrument	OECD MC and Commentary Update
avoid hybrid mismatch arrangements	≈ MLI
introduce limitation of benefits (SLOB) or principal-purpose test	introduce limitation of benefits (SLOB) and principal-purpose test
avoid the artificial avoidance of PEs	≈ MLI
avoid tax planning schemes with (third-country) PEs	≈ MLI
introduce corresponding adjustments	≈ MLI (since 1977)
avoid tax planning with transparent partnerships	≈ MLI
restrict treaty entitlement of dual resident companies	≈ MLI
introduce a saving clause	≈ MLI



4. Conformity and Divergence

G20/OECD Multilateral Instrument

OECD MC and Commentary Update

cope with dividend stripping

≈ MLI

introduce situs principle for capital gains
derived from shares in a REIT (...)

≈ MLI
(since 2003)

effectuation of MAP

≈ MLI

introduction of non-binding arbitration

≈ MLI



4. Conformity and Divergence

G20/OECD Multilateral Instrument

OECD MC and Commentary Update



use residence instead of POEM
for rules on international traffic



exclude boats and inland waterways
transport from rules on international traffic



insert rules on recognised pension funds

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G20/OECD Multilateral Instrument

OECD MC and Commentary Update

single-use tool,
but NB Article

evolving living instrument

solid

liquid

clash of languages

linguistic integration

spill-over effects on DTC interpretation,
also on non-covered agreements

dynamic interpretation of old DTCs
along the lines of the 2017 Update
to the OECD MC Commentary?

usage also for non-DTC related measures

strict confinement on DTCs





Beyond the MLI

BEPS-related Changes in the OECD Update 2017



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TAX TREATY CHANGES THROUGH THE MLI AND EU LAW



Univ.-Prof. DDr. Georg Kofler, LL.M. (NYU)

The MLI and the OECD Update 2017: BEPS in Tax Treaties
University of Luxembourg, 14 December 2017

TIE BREAKER | ART 4 MLI

- Tie-breaker rule for determining the treaty residence of dual-resident persons other than individuals → Art 4 MLI and Art 4(3) OECD MC 2017 (alternative version in Art 4 para 24.1 OECD-MC Comm. 2008)

Replace paragraph 3 of Article 4 by the following:

3. Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, ~~then it shall be deemed to be a resident only of the State in which its place of effective management is situated.~~ *the competent authorities of the Contracting States shall endeavour to determine by mutual agreement the Contracting State of which such person shall be deemed to be a resident for the purposes of the Convention, having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors. In the absence of such agreement, such person shall not be entitled to any relief or exemption from tax provided by this Convention except to the extent and in such manner as may be agreed upon by the competent authorities of the Contracting States.*

- Residency under Art 4(3) OECD MC not subject to arbitration under Art 26 et seq. MLI (Art. 4 para. 58 of the MLI Explanatory Memorandum) → Directive (EU) 2017/1852 on tax dispute resolution mechanisms

TIE BREAKER | *ART 4 MLI*

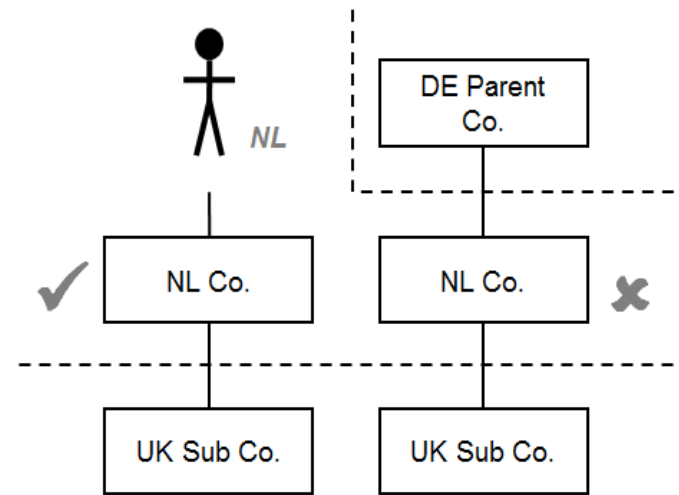
- Falling out of and under treaty protection based on Art 4(3) OECD MC and competent authority agreement → Import and exit? (ECJ, 23 January 2014, C-164/12, *DMC*, EU:C:2014:20, and ECJ, 21 May 2015, C-657/13, *Verder LabTec*, EU:C:2015:331)
- Dual-resident companies with PoEM in a third country would (again) qualify under the company tax directives (e.g., Art. 2(a)(ii) PSD)

ANTI ABUSE | *ART 7 MLI*

- BEPS minimum standard
 - General anti-abuse rule based on the principle purposes of transactions or arrangements (“PPT-Rule”) → Art 7(1) MLI and Art 29(9) OECD MC 2017
 - Simplified or comprehensive Limitation-on-Benefits-Provision (“LoB-Rule”) → Art 7(8) to (13) MLI and Art 29(1) to (7) OECD MC 2017
- EU legal sources
 - Fundamental freedoms → PPT? LoB?
 - Art 6 ATAD and more specifically Art. 1(2) to (4) PSD, Art. 5 IRD and Art. 15(1)(a) MD (e.g., ECJ, 7 September 2017, C-6/16, *Eqiom*, EU:C:2017:641)
 - EU Commission’s recommendation C(2012) 8806 final of 6.12.2012 on aggressive tax planning → Subject-to-tax clause
 - EU Commission’s recommendation C(2016) 271 of 28.1.2016 on the implementation of measures against tax treaty abuse → Modified PPT

ANTI ABUSE | ART 7 MLI

- Simplified LoB → Limitation of substantive treaty benefits to “qualified persons” with a series of objective, self-executing tests for non “qualified persons” (i.e., active business test and ownership test [50%]), including a derivative benefits clause [75% of shareholders are “equivalent beneficiaries”] and a subjective clause (competent authority of source State may grant benefits)
- Doubts as to EU compatibility in light of the *Open Skies* judgments (e.g., ECJ, 5 November 2002, Case C-466/98, *Commission v. United Kingdom*, EU:C:2002:624) and the Commission’s infringement proceeding against the Netherlands (MEMO/15/6006 [19 November 2015])
- “It is also recognised that the LOB rule will need to be adapted to reflect certain constraints or policy choices concerning other aspects of a bilateral tax treaty between two Contracting States (e.g. constitutional restrictions or concerns based on EU law or policy choices concerning the treatment of collective investment vehicles)” (para. 21 of the final BEPS report on Action 6).
- Solved by *ACT Group Litigation* (ECJ, 12 December 2006, Case C-374/04, EU:C:2006:773)?



ANTI ABUSE | *ART 7 MLI*

- EU Commission's recommendation C(2016) 271 of 28.1.2016 on the implementation of measures against tax treaty abuse → Vital that MS measures "are in line with the agreed standards across the Union"

Where Member States, in tax treaties which they conclude among themselves or with third countries, include a principal purpose test based general anti-avoidance rule in application of the template provided for in the OECD Model Tax Convention, Member States are encouraged to insert in them the following modification:

"Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that *it reflects a genuine economic activity or that* granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention."

HOLDING PERIOD | *ART 8 MLI*

■ Dividend transfer transactions → Art 8 MLI and Art 10(2) OECD MC 2017

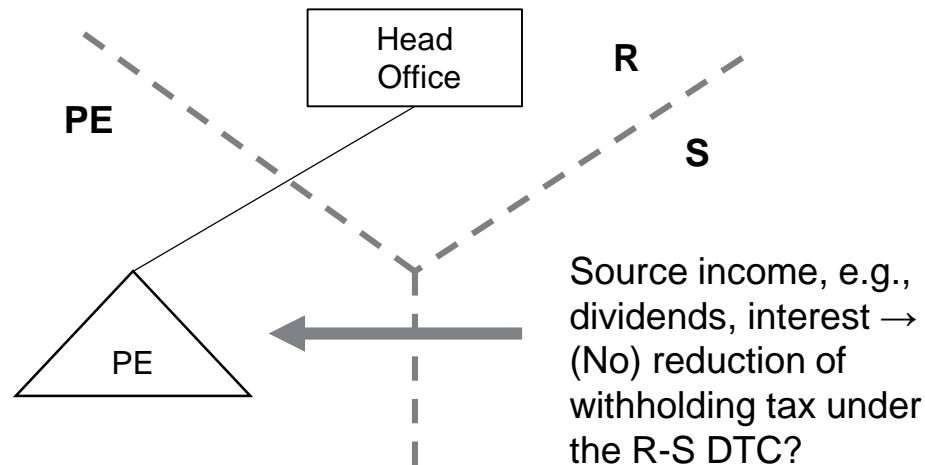
Replace subparagraph 2 *a*) of Article 10 by the following:

- a) 5 per cent of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which holds directly at least 25 per cent of the capital of the company paying the dividends throughout a 365 day period that includes the day of the payment of the dividend (for the purpose of computing that period, no account shall be taken of changes of ownership that would directly result from a corporate reorganisation, such as a merger or divisive reorganisation, of the company that holds the shares or that pays the dividend);*

■ Holding period in the PSD with look-back approach, i.e., it is sufficient that the minimum holding period is completed after the distribution (ECJ, 17 October 1996, C-283/94 etc, *Denkavit, VITIC and Vormeer*, EU:C:1996:387)

THIRD-COUNTRY PE | *ART 10 MLI*

- Anti-abuse rule for permanent establishments situated in third States → Art 10 MLI and Art 29(8) OECD MC 2017 (see also the OECD-Report on „Triangular Cases“, Art 10 para 32, Art 11 para 25, Art 12 para 21 und Art 24 para 71 OECD MC Comm.; Art 1(8) US-MC)



- Art 24(3) OECD MC and *Saint-Gobain* for the PE State, but also obligation for the Source State to (fictitiously) apply the S-PE DTC and reduce withholding taxation? *Open Skies?* Union loyalty?

SAVING CLAUSE | *ART 11 MLI*

- Application of tax treaties to restrict a Contracting State's right to tax its own residents? → Art 11 MLI and Art. 1(3) OECD MC 2017

3. This Convention shall not affect the taxation, by a Contracting State, of its residents except with respect to the benefits granted under paragraph 3 of Article 7, paragraph 2 of Article 9 and Articles 19, 20, 23 [A] [B], 24, 25 and 28.

- “Saves” residence State taxation, e.g., with regard to CFC rules → Would eliminate potential conflicts between “old” tax treaties (Art. 7, 10(5)) and Art. 7 ATAD (Art. 351 TFEU)
- Disapplies the “limiting effect” of Art. 9 and the arm’s length standard → Art. 4 of the EU Arbitration Convention, [1990] OJ L 225/10

PE | *ART 12, 13 MLI*

- Shifting of taxing rights between Contracting States based on new treaty allocation in case of agency PEs or PE exemptions
 - Permanent establishments for commissionaire and similar sales and marketing models → Art 12 and 15 MLI and Art 5(5), 5(6) and (8) OECD MC 2017
 - Preparatory or auxiliary activities → Art 13 MLI and Art 5(4) OECD MC 2017
- Exit and entry taxation? Fundamental Freedoms (ECJ, 23 January 2014, C-164/12, *DMC*, EU:C:2014:20, and ECJ, 21 May 2015, C-657/13, *Verder LabTec*, EU:C:2015:331)?

ARBITRATION | *ART 16-26 MLI*

- Arbitration under Art 16-26 MLI *versus* Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, [2017] OJ L 265/1 (effective for complaints from 1 July 2019 for tax years commencing on or after 1 January 2018).
- Directive takes precedence over other proceedings (Art 16(5))
- Subject matter and scope

Not limited to double taxation (but a Member State may deny access to the dispute resolution procedure under Art 6 on a case by case basis where a question of dispute does not involve double taxation (Art 16(7)).

DTCs and EU
Arbitration
Convention.

Subject matter and scope

This Directive lays down rules on a mechanism to resolve disputes between Member States when those disputes arise from the interpretation and application of agreements and conventions that provide for the elimination of double taxation of income and, where applicable, capital. It also lays down the rights and obligations of the affected persons when such disputes arise. For the purposes of this Directive, the matter giving rise to such disputes is referred to as a 'question in dispute'.

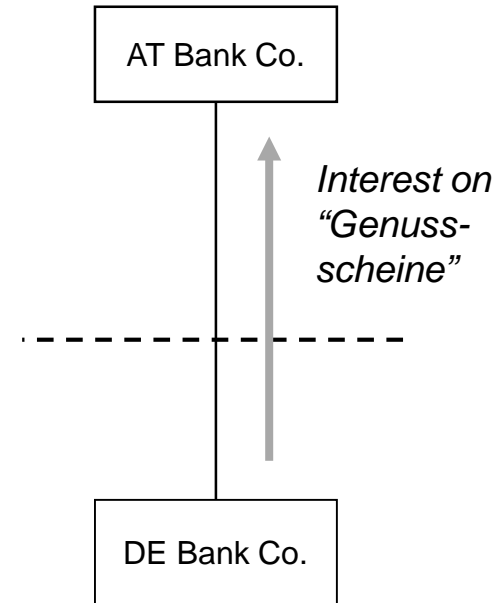
Not included VAT, inheritance taxes, might raise issues with regard to the notion of income.

Individuals and corporations.

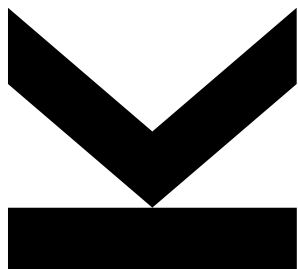
ARBITRATION | *EXCURSUS*

■ ECJ (Grand Chamber), 12 September 2017, C-648/15, *Austria v. Germany*, EU:C:2017:664

- ECJ as arbitration court under Article 25(5) of the Austro-German Convention → Article 273 TFEU (dispute related to the subject matter of the treaties) ✓
- Interest on “Genussscheine” (annual payment at a fixed percentage, but reduction in cases of losses and subsequent making up)
 - Austria: Art. 11(1) DTC → Exclusive taxing right in the residence State. → ✓
 - Germany: Art. 11(2) DTC (exception from para. 1, *inter alia*, for “debt-claims with participation in profits”) → Unlimited taxing right in Germany (and credit in Austria) → ✗



QUESTIONS?



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